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# In the Supreme Court of the United States

October Term, 1974

No. 74-841

CENTRAL NATIONAL LIFE INSURANCE COMPANY,

*Petitioner,*

vs.

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL NUMBER 953, LOCAL NUMBER 392, LOCAL NUMBER 326, LOCAL NUMBER 370, LOCAL NUMBER 371, LOCAL NUMBER 490, LOCAL NUMBER 428 and LOCAL NUMBER 612,

*Respondents.*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

## Respondents' Brief in Opposition

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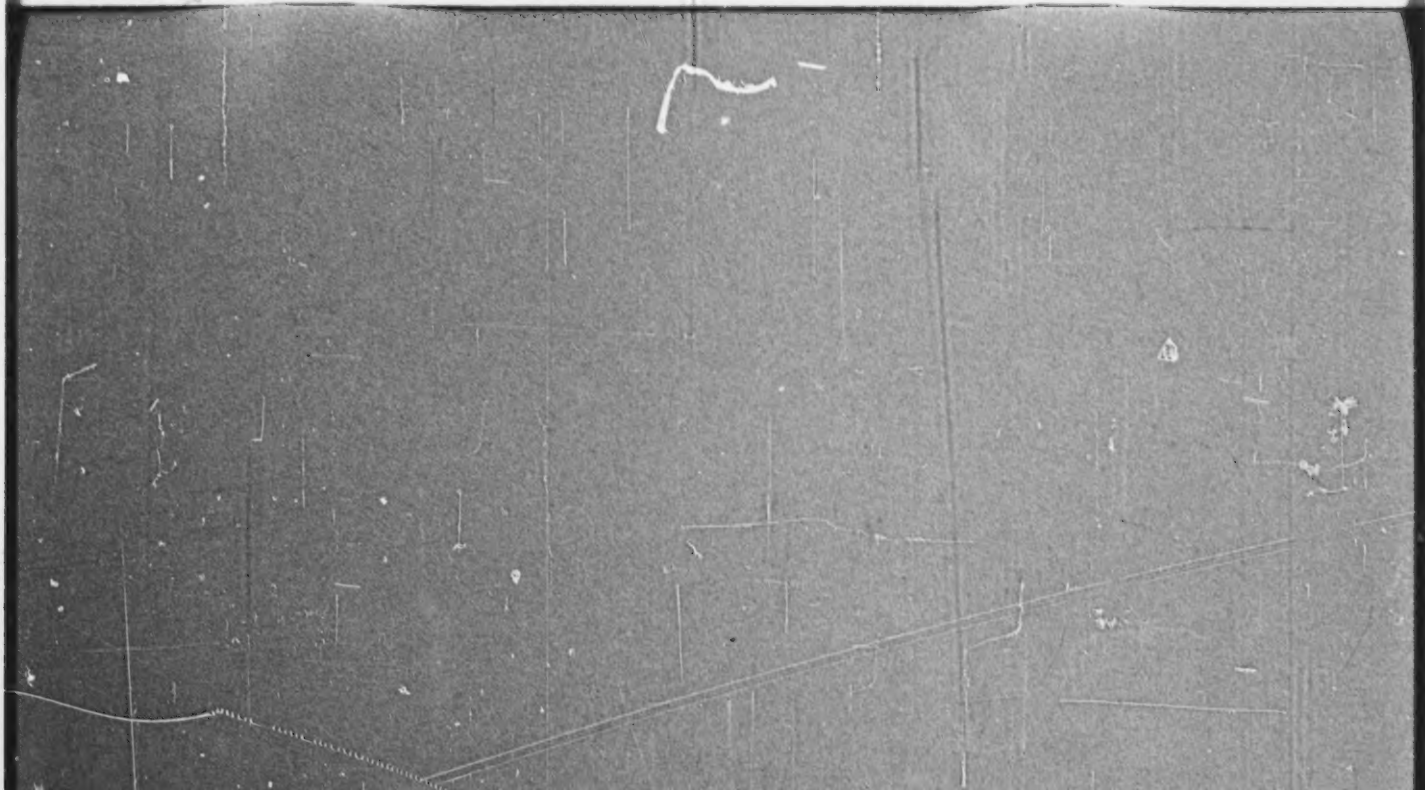

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# In the

# Supreme Court of the United States

October Term, 1974

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No. 74-641

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CENTRAL NATIONAL LIFE
INSURANCE COMPANY,

*Petitioner,*

vs.

INTERNATIONAL UNION OF OPERATING
ENGINEERS, LOCAL NUMBER 953, LOCAL
NUMBER 302, LOCAL NUMBER 326, LOCAL
NUMBER 370, LOCAL NUMBER 371, LOCAL
NUMBER 400, LOCAL NUMBER 428 and
LOCAL NUMBER 612,

*Respondents.*

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On Petition for Writ of Certiorari to the United States
Court of Appeals for the Tenth Circuit

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Respondents' Brief in Opposition

## I
## QUESTIONS PRESENTED

Respondents believe Petitioner inaccurately and prematurely set forth the Questions Presented. (Petition, at 2,3). Petitioner states, as a fact, that "[t]he language in Ill. Rev. Stat. ch. 73, Sec. 842 (2) (e) . . . [is] expressly incorporated into the insurance contract with respondents . . . ."

Such alleged incorporation has never been established by testimony or evidence in the proceedings below, thus the questions presented for review are:

A. Is Ill. Rev. Stat. ch. 73, Sec. 842 (2) (e) applicable to the Master Group Policy MMG 1128 (hereinafter referred to as "MMG 1128")?

B. If so, is the language in Ill. Rev. Stat. ch. 73, Sec. 842 (2) (e) expressly incorporated into MMG 1128?

C. If so, did the "75% enrollment requirement" mean that:

1. 75% of the individual members of each and every local union compromising the Western States Conference of Operating Engineers ("WCOE") must enroll or remain insured under MMG 1128, or

2. 75% of the individual members of each local union affiliated with the WCOE which chose to participate, must enroll or remain insured under MMG 1128?

D. Assuming A, B and C-1 above and that the Respondents did not meet the 75% enrollment requirements, did the Petitioner expressly or impliedly waive its right, pursuant to Illinois law, to terminate MMG 1128?

## II
## STATEMENT

Respondents, International Union of Operating Engineers Local Unions 953, 302, 326, 370, 371, 400, 428 and 612 ("Locals") are unincorporated associations and labor organizations as defined under 29 U.S.C. Sec. 152 (5) having their

principal places of business in the states of Arizona, Montana, New Mexico, Washington and Wyoming. (Finding of Fact No. 1, A. 23).[1] The Western States Conference of Operating Engineers ("WCOE") is a voluntary unincorporated association of local unions, including the Locals who are the Respondents in this case, organized for the purpose of assisting the Locals in solving common problems by serving as a clearing-house and functioning through a workshop type of method. (Pl. Ex. 5, R. 31, App. 1016; R. 93-94, 201, 339-340).[2] The Locals govern themselves as independent, autonomous organizations, WCOE has no power or control over the Locals and WCOE does not have the power to contractually obligate the Locals. (App. 62; R. 97, 122, 201-202, 339, 341).

The Petitioner, Central National Life Insurance Company ("CNL") is an Illinois life insurance company which was represented in the negotiation, issuance and administration of the policy contract involved in this case by its Group Vice-President, and by one of its General Agents. (Pl. Ex. 8, R. 365, App. 2047-2050; Pl. Ex. 10, R. 370, App. 2053-2066; App. 63, 64; R. 104, 117, 211-212, 215-216, 227, 330, 363-364, 370-371, 442).

At a meeting held on November 10, 1970, representatives of certain interested local unions unanimously agreed that the officers of WCOE were to continue efforts to gain information on group life insurance coverage which could be obtained by the local unions. (Finding of Fact No. 5, A. 24; Pl. Ex. 7, R. 346, App. 2046). Not all local unions in WCOE were interested in obtaining such coverage. (R. 213-214, 219-220, 244-245, 258, 384). The interested local unions were in hopes that insuring the lives of their individual members under the framework of a

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1 "A" refers to the appendix to the Petitioner's Petition for Writ of Certiorari.

2 "R" refers to the Record of the Transcript of Proceedings. "App." refers to the Appendix for Appellant prepared for the United States Court of Appeals for the Tenth Circuit.

single master group policy would enable them to obtain a cheaper premium rate than many of them were singly paying at that time, because of the larger number of lives insured. (R. 210-211, 269-270, 343, Pl. Ex. No. 6, R. 362, App. 2038). The Secretary-Treasurer of WCOE furnished identical census data on only the interested local unions to insurance companies interested in bidding the coverage. (R. 346-347, 349-350, 447-448). Those insurance companies included CNL and SAFECO Life Insurance Company ("Safeco"). The census data included, among other things, the number of members in each interested local union, the average and actual ages of its members, the insurance company which was presently writing its coverage, if any, the type of coverage then in effect and the premium rate then being paid. (Df. Ex. 14, R. 63, App. 1056-98). This census data specifically gave CNL notice of the premium rates being paid by the Locals *prior* to the time CNL quoted its rate to the Locals. There is no evidence to show that CNL requested claims experience on the interested local unions in WCOE. One of CNL's General Agents attended the November 10, 1970, meeting. (R. 104).

Following receipt of the census data, CNL's General Agent transmitted it to the Group Vice-President at CNL's home office in Jacksonville, Illinois. (R. 740-741). The Group Vice-President acknowledged by letter that he had reviewed it. (Pl. Ex. 81, R. 54, App. 4038). He gave the census data to one of the secretaries in the Group Department, and instructed her to compute the premium rate. (R. 744-746). The Group Vice-President had the responsibility and authority to compute and quote premium rates, to bind new coverage and to issue policy contracts for CNL. (R. 536-537, 699, 726-727, 729, 884-887; Pl. Ex. 201, R. 886, App. 4421-4423; Pl. Ex. 202, R. 884, App. 4427; Pl. Ex. 206, R. 888, App. 4441). This secretary had computed premium rates on approximately twenty-five other groups during the few months she had been employed under the Group Vice-President in the Group Department. (R. 744-746).

She computed rates in accordance with the Lincoln National Rate Manual as adopted by CNL's management. (R. 528-529, 728, 779, 890-891). She later testified that some of the census data furnished by the Locals had been used to quote the rate but that she could not recall if there had been "additional sheets" in it at the time she computed the rate (R. 762). No additional data was requested from the Locals by CNL (App. 64; R. 784, 168-169). The secretary computed a rate of 45c per $1,000 per member per month, and gave the rate sheets to the Group Vice-President and had nothing more to do with it. (R. 747-749; Pl. Ex. 210, R. 54, App. 4453-4460). CNL's expert witness testified that the secretary used the proper form from the Lincoln National rate manual in the proper way in figuring this rate. (R. 528-529). The rate sheets indicate the Group Vice-President applied a .83 volume discount and came up with a rate of 37c per $1,000. (R. 783). Both of CNL's expert witnesses said it was appropriate to use a discount factor on a group this size. (R. 529-530, 641, 647-648). The Group Vice-President then added 10c per $1,000 for a profit margin and arrived at the rate quoted of 47c per $1,000. (Pl. Ex. 210, R. 54, App. 4460; R. 783). Therefore, the rate charged by CNL was actually 10c per $1,000 higher than computed by the secretary and by the Group Vice-President.

Subsequent to the meeting of November 10, 1970, the General Agent of CNL received telegraphic authorization from CNL's Group Vice-President, to quote a 3 year guaranteed premium rate of 47c each $1,000 of life insurance coverage per member per month. He quoted the rate by letter to the Secretary-Treasurer of WCOE on December 14, 1970, and attached a copy of his telegraphic authorization. (Pl. Ex. 8, R. 365, App. 2047-2050).

On December 22, 1970, the interested local unions met to consider bids from several insurance companies. (R. 104, 211; Pl. Ex. 9, R. 368, App. 2051-2052). Those bids were narrowed down to the two lowest bids submitted by CNL and Safeco.

(R. 356-357). CNL's General Agent explained CNL's bid. CNL's bid at 47c was only a few cents lower than the Safeco bid for the basic coverage sought. (R. 213; Pl. Ex. 42, R. 360, App. 3015-3019). However, CNL's bid had certain other advantages, including a premium rate guaranteed for three years, (Pl. Ex. 1, R. 113, App. 1002; Pl. Ex. 2, R. 111, App. 1013). To verify the General Agent's authority to quote that rate, he was asked to have an officer of CNL available to once again meet with the interested local unions on January 15, 1971. (R. 117-118, 212, 227, 243-244, 441-442). Subsequent to the December meeting, draft copies of Master Group Policy MMG 1128, the master application and the addendum (all referred to as "MMG 1128") were furnished to the interested local unions by the General Agent and the Group Vice-President in order that their representatives could be prepared to discuss them at the January 15 meeting. (Pl. Ex. 10, R. 370, App. 2053-2066; Pl. Ex. 11, R. 370, App. 2067; R. 106-107, 369).

The General Agent and the Group Vice-President met with the interested local unions on January 15, 1971, and verified the three year guaranteed rate and the three year guarantee previously quoted. (App. 63; R. 117-118, 227, 330). They explained that CNL hoped to obtain additional insurance business from local unions in the west as a result of writing MMG 1128. (R. 215, 219; Pl. Ex. 182, R. 54, App. 4350). Certain amendments to the policy were made by the General Agent and the Group Vice-President at the request of the local unions, including an amendment requiring participation of only 75% of the eligible members "each local union" (R. 316-329, 108, 222-223, 381, 383, 117-118), because it was not possible to cover 75% of the local unions in the WCOE or 75% of the individual members of locals in the WCOE. (R. 324, 246, 438, 439, 457; Pl. Ex. 12, R. 376, App. 2069; Pl. Ex. 2, R. 111, App. 1013). Detailed discussions were held concerning the 3 year guaranteed rate and the coverage. (R. 118-119, 215-216, 356). The interested local unions passed a motion authorizing the

officers of WCOE to execute an application on behalf of the interested locals. (R. 122, 224, 474; Finding of Fact No. 6, A. 24).

Effective January 1, 1971, Defendant offered and made available its contract of insurance, MMG 1128, to local unions which were members of WCOE. A local could join on only monthly premium due dates prior to July 1, 1971. (Pl. Ex. 3, R. 112, App. 1014; Finding of Fact No. 7, A. 24). The Locals who are Plaintiffs in this case, between the dates of January 1, 1971, and July 1, 1971, each notified CNL of its election of participate under MMG 1128 from its business office in the state of its residence. (Finding of Fact No. 9, A. 25; App. 63-64; Pl. Ex. 53, R. 873, App. 1024; Pl. Ex. 83, R. 54, App. 4052; Pl. Ex. 125, R. 54, App. 4163; Pl. Ex. 143, R. 54, App. 4226). Premiums were paid by each Local from its business office. (App. 64). MMG 1128 provided any local in WCOE could apply to have its membership covered. Defendant mailed its acceptance of liability under MMG 1128 to each Local at its business office. (Finding of Fact No. 10, A. 25; App. 64; Pl. Ex. 54, R. 54, App. 1025; Pl. Ex. 84, R. 54, App. 4053; Pl. Ex. 114, R. 54, App. 4124; Pl. Ex. 124, R. 54, App. 4161; Pl. Ex. 142, R. 54, App. 4225; Pl. Ex. 161, R. 54, App. 4275; Pl. Ex. 175, R. 54, App. 4331; Pl. Ex. 176, R. 54, App. 4332). A copy of MMG 1128 was delivered by CNL through the mail to the business office of each Local in the state of its residence. (Finding of Fact No. 11, A. 25; App. 64; Pl. Ex. 16, R. 54, App. 2070-2073; Pl. Ex. 49. R. 54, App. 3036-3050; Pl. Ex. 139, R. 54, App. 4222; Pl. Ex. 162, R. 54, App. 4276; Pl. Ex. 166, R. 54, App. 4291; Pl. Ex. 181, R. 54, App. 4349). Locals possessed authority in accordance with applicable federal labor law and state insurance statutes and in accordance with their bylaws, minutes, and the custom and practice of their local unions to obtain, on behalf of their members and for their benefit, group life and accident insurance. (Finding of Fact No. 2, A. 24; App. 62, 63; R. 94, 91, 124, 201, 200, 225-227, 261-262, 273).

MMG 1128 provided on its face that the monthly premium

rates contained therein (in the application and in the addendum thereto) were "guaranteed for three (3) years" and that the policy was issued for a three year term subject to the policyholder having the option to renew each year on the anniversary date of the policy. (Pl. Ex. 1, R. 113, App. 1002; Pl. Ex. 2, R. 111, App. 1013 and R. 591-592). The premium rates were 47c each $1,000 (23.5c each $500) of life insurance coverage per member per month, 5c each $1,000 (2.5c each $500) of accidental death and dismemberment coverage per member per month, and 52c each $1,000 (26c each $500) for dependent coverage per family unit. (Pl. Ex. 3, R. 112, App. 1014).

Pursuant to said contract MMG 1128, the Plaintiff Locals accepted the coverage offered, notified CNL, and paid initial premiums to bind coverage, which premiums were accepted by CNL. In excess of 75% of the eligible members of each of Locals were enrolled under MMG 1128 (Unnumbered summary of per capita reports and premium reports for each local union prepared at request of trial judge, App. 2030-2037; stipulation at App. 64; Finding of Fact No. 20, A. 27). Thereafter, until CNL cancelled MMG 1128, Locals paid all premiums when due (Finding of Fact No. 16, A. 26). WCOE paid no premiums under MMG 1128 and had no responsibility to do so. (R. 387-388). CNL paid death claims pursuant to MMG 1128 until it ordered all pending death claim payments held up following its notice of cancellation. (Df. Ex. 32, R. 713, not included in App.).

MMG 1128 was the largest piece of group life insurance business ever written by CNL at that time. (R. 894). The new policy was reported to CNL's management, including its President, in daily New Business Reports (R. 829-835, 864, 893-895) submitted by the Group Department, headed by the Group Vice-President, and by the Agency Department, and in monthly IBM computer runs. (R. 786-790, 892-893). CNL's President testified that he carefully studied such reports (R. 892), and became aware of MMG 1128 perhaps as early as February, 1971. (R. 863-364). However, he did not actually look

at MMG 1128 until May of 1971. (R. 867).

CNL set up its files on MMG 1128 by local union and administered the coverage on a local-by-local basis. (R. 740; Df. Ex. 42, R. 66, not included in App.). The decision by CNL to accept or refuse liability under MMG 1128 was made separately for each local union at different times. This is evidenced by the fact that CNL refused coverage to Local Union 3, the largest local in WCOE because that local had not complied with conditions required before that local's coverage could become effective under MMG 1128. Local Union 3 had not enrolled 75% of its eligible members under MMG 1128. CNL refunded all premiums to Local 3 and Local 3 returned all death claims payments to CNL. (R. 814-827; Pl. Ex. 235, R. 817, App. 1055; although the court allowed relevant portions of this exhibit to be read into evidence, the trial court excluded the exhibit itself, R. 944-945). All other participating local unions, including the Locals in this case complied with MMG 1128 and their coverage became effective and was in force until unilaterally cancelled by CNL. (Conclusion of Law No. 10, A. 32). Finally, the trial judge ruled that testimony and evidence regarding its transactions with CNL were not admissable, as Local Union 3 is not a Plaintiff in this case. (R. 944-945, 715-717, 766-767).

In the early part of August 1, 1971 CNL became aware that death benefit claims paid pursuant to MMG 1128 began to exceed its expectations. (R. 703, 775). After the information regarding the loss ratio had been furnished to CNL's legal counsel, it was decided to write the letter of termination. (R. 704). On or about August 18, 1971, legal counsel to CNL, who is also the Senior Vice-President and a member of the Board of Directors, instructed the newly appointed Group Vice-President to cancel MMG 1128. (R. 703, 775). He sent notices of cancellation to the Locals. (Pl. Ex. 62, R. 54, App. 3059; Pl. Ex. 89, R. 54, App. 4057; Pl. Ex. 101, R. 54, App. 4091; Pl. Ex. 116, R. 54, App. 4125; Pl. Ex. 128, R. 54, App. 4178; Pl. Ex. 147, R. 54, App. 4250; Pl. Ex. 167, R. 54, App. 4292 and Pl. Ex. 183,

R. 54, App. 4351). The sole reason given for the cancellation was that "since the Presidential wage price freeze prevents us from increasing premiums, we have no other alternative other than to cancel the above contract effective September 1, 1971." (Finding of Fact No. 22, A. 27). The new Group Vice-President testified that legal counsel gave him no reason for the cancellation other than the claims were exceeding premiums by about two to one. (R. 703-704, 775). At that time, he was not aware and did not check to see if 75% of the eligible members of each participating local union was enrolled under MMG 1128. (R. 791). The President of CNL testified that it had no position on the validity or invalidity of MMG 1128 at the time of cancellation. (R. 909-913). No notice of cancellation was sent to WCOE. (Finding of Fact No. 23, A. 27).

After its notice of cancellation, CNL refused to pay death benefits on valid death claims to Locals' members as required by MMG 1128. (Finding of Fact No. 25, A. 27; R. 776). The total amount of unpaid valid death claims exceeded $175,000. (R. 793, 917). CNL refused to pay the pending claims until the Locals agreed to pay a premium rate higher than the three year guaranteed rate specified in MMG 1128. (R. 917-920, 138-144, 231-233, 280-281, 287-288, 414, 416-417, 429-430, 776, 793-794; Pl. Ex. 197, R. 793, App. 4417-4420; R. 880, 882).

On August 26, 1971, CNL decided to suspend the cancellation of MMG 1128 for two weeks. (Pl. Ex. 64, R. 54, App. 3061; Pl. Ex. 90, R. 54, App. 4058; Pl. Ex. 102, R. 54, App. 4092; Pl. Ex. 117, R. 54, App. 4126; Pl. Ex. 129, R. 54, App. 4179; Pl. Ex. 149, R. 54, App. 4252; Pl. Ex. 168, R. 54, App. 4293; Pl. Ex. 185, R. 54, App. 4353). A Memorandum of Understanding ("Memo") was signed between CNL and WCOE on October 14, 1971. (Pl. Ex. 4, R. 54, App. 1015). CNL agreed therein to "immediately resume processing all pending claims under the previous coverage" and the rate for life insurance was increased from 47c to $1.00 per $1,000 per member per month, effective October 1, 1971. The Memo expressly provided "that neither party surrenders or

in any way modifies its position as to the validity or invalidity of that certain document numbered MMG 1128." Plaintiff Local 953 refused to pay the higher premium rate. (Finding of Fact No. 27, A. 28). All other Plaintiff Locals paid the higher premium rate from October 1, 1971, until March 1, 1972. (Finding of Fact No. 26, A. 27).

The Locals' reason for complying with the Memo was to secure the payment of $175,000.00 in death claims withheld by CNL while not affecting the rights of the parties with respect to MMG 1128. (Finding of Fact No. 36, A. 29; R. 413-417, 429-430, 465-466).

After analyzing bids to determine the lowest rate available for replacement insurance, Local 953, effective October 15, 1971, entered into a contract with Hartford Life and Accident Insurance Company and the other Locals, effective March 1, 1972, entered into a contract with Safeco. (R. 289-294, 146, 154-158, 162, 398-399; Stipulation at App. 64). The replacement coverage provided the same death benefit coverage at a higher premium rate than had been provided under MMG 1128. Even though it was more expensive, the replacement coverage was not as desirable as the coverage under MMG 1128 because only a one year guaranteed premium rate could be secured as opposed to the three year guaranteed rate under MMG 1128. (R. 633).

The Locals then filed this lawsuit seeking damages in the exact amount of increased premium costs resulting from having to obtain replacement insurance coverage at a higher premium rate from October 1, 1971, for the remaining term of the three-year guarantee contained in MMG 1128 issued and prematurely cancelled by CNL. Damages were computed by Locals' expert witness, a qualified and experienced actuary. (R. 489-495).

CNL's President and new Group Vice-President testified that the worksheets used to compute the premium rate for MMG 1128 had not been examined by CNL until over one year after the

cancellation when the Locals took depositions pursuant to this lawsuit in CNL's home office in October, 1972. (R. 707, 883). Neither had anyone in CNL discussed the rate computation with the previous Group Vice-President or the secretary who performed the calculations prior to October, 1972. (R. 763, 778). Neither CNL's President or Group Vice-President, nor either of CNL's two expert witnesses were actually aware as to the exact data available to the secretary and the previous Group Vice-President when the rate was computed. (R. 500, 515, 778, 883, 891). The secretary was not certain. (R. 762-763). The previous Group Vice-President was not called as a witness.

Locals 953, 302, 326, 370, 371, 400, 428 and 612 have obtained judgment for the difference between the premium cost of MMG 1128, issued by CNL for a three-year term with its premium rate guaranteed for three years, and the increased premium cost for replacement coverage for the remainder of the three-year term of MMG 1128. The judgment was rendered on May 21, 1973 by the Honorable Edwin L. Mechem, United States District Judge, in the full amount of the amended prayer of the complaint. (A. 36). Judge Mechem rendered his decision after a trial which lasted for six days, consisting of the testimony of fifteen witnesses, in person and by deposition, and several thousand pages of exhibits admitted as evidence. On July 30, 1974, the United States Court of Appeals for the Tenth Circuit affirmed the judgment of the trial court. 501 F.2d 902 (10th Cir. 1974). Petition for rehearing was denied on August 27, 1974.

## III
## ARGUMENT

### A. Ill. Rev. Stat. ch. 73, Sec. 842 [2] [e] is not applicable to MMG 1128.

CNL contends that the insurance contract MMG 1128 was governed by Ill. Rev. Stat. ch. 73, Sec. 842 (2) (e) (1973), ("Sec. 842 (2) (e)") which reads as follows:

"(2) The following forms of life insurance, in addition to those described in subsection (1), are hereby declared to be group life insurance within the meaning of this Article:

(e) Life insurance, written under a policy issued to one or more *trustees* of a fund established by an association of employers on behalf of its members, or by two or more employers in the same industry or by one or more labor unions or by one or more employers and one or more labor unions, which *trustees shall be deemed the policyholder,* covering employees of the employers or members of the unions for the benefit of persons other than the employers or the unions, subject to the following conditions:

(i) The persons eligible for insurance shall be all of the employees of the employers or all of the members of the unions, or all of any class or classes thereof determined by conditions pertaining to their employment, or to membership in the unions, or to both. The policy may provide that the term "employees" shall include retired employees . . . .

(ii) The premium for the policy shall be paid by the trustee or trustees wholly from funds furnished by the employer or employers of the insured persons. Such funds may be derived, at the option of each employer, in part from contributions by the employees insured. The policy must insure all eligible employees of each employer who does not derive any part of such funds from contributions by his employees and at least 75% of the eligible employees of each employer who does derive a part of such funds from contributions by his employees, except, in either case, any employee as to whom evidence of individual insurability is not satisfactory to the insurer. For the purposes of this paragraph a union shall be deemed to be an employer and a member of a union shall be deemed to be an employee. (Emphasis added.)"

It is clear from the language of subsection (e) that the subsection only applies when a life insurance policy is issued to the "trustees of a fund." In such event, the "... trustees shall be deemed the policyholder." Further, "[t]he premium for the policy shall be paid by the trustee or trustees . . . ." There were no trusts, trustees or fund involved in the issuance or

administration of MMG 1128. Moreover, MMG 1128 designates the policyholder to be the ". . . members of the Western States Conference of Operating Engineers." (Pl. Ex. 1, R. 113, App. 1002). The "members" of the WCOE are the local unions. (Pl. Ex. 5, R. 31, App. 1016; R. 201, 340, 93-94). The trial court found the contract was entered into by each local and CNL. (Finding of Fact No. 34, A. 29; Finding of Fact No. 7, A. 24). Premiums were paid by each local from its business office. (App. 64), not by a trustee or trustees.

Subsection (e) refers to what is popularly known as jointly administered Taft-Hartley Trusts created under Section 302 (c). (5) of the Labor Management Relations Act. 29 U.S.C.A. Sec. 186 (c) (5); *see* R. Eilers and R. Crowe, *Group Insurance Handbook* 618-32 (1965). The Illinois group life statutes are predicated on the National Association of Insurance Commissioner's ("NAIC") 1917 Model Act. R. Eilers and R. Crowe, *Group Insurance Handbook* 87 (1965). The NAIC Model Act classifies group life insurance coverage into four types, one of which is multiple-employer groups arising out of Taft-Hartley collective bargaining situations or similar arrangements. R. Eilers and R. Crowe, *Group Insurance Handbook* 915-18 (1965).

Further, the testimony of various representatives indicates these individuals recognized the distinction between a policy to be purchased by a trust and a policy to be purchased by a local itself. (R. 92, 120, 200).

Assuming, arguendo, that subsection (e) does apply to a policy issued to a non-trustee policyholder, CNL has still failed to show from the statutory language itself or legislative intent that the "75% requirement" of subsection (e) goes beyond a single policyholder and encompasses the situation wherein multiple policyholder exist under one master group policy. Absent clear legislative intent, the intent must be gleaned from the language of the statute itself. *Bronson v. Washington,* 55 Ill. App. 2d 523, 202 N. E. 2d 172 (1965). It appears that subsection

(e) is not directed at multiple policyholders.

The Respondents submit that Ill. Rev. Stat. ch. 73, Sec. 842 (2) (c) is the proper subsection governing MMG 1128:

> "(c) Life insurance covering the full privileged, voting contributing members of any association which has been in existence for at least one year, not formed for the exclusive purpose of procuring insurance, or life insurance covering the members of any labor union, *written under a policy issued to such* association or *union which shall be deemed to be the employer* for the purposes of this article, *the premium on such policy to be paid by the* association or *union* either from its own funds or from funds contributed by members or both, and insuring any of its members who are actively engaged in the same occupation, for amounts of insurance based upon some plan which will preclude individual selection, for the benefit of persons other than the association or union, or its officials. The term "association" or "members" may include employees of either. (Emphasis added)."

The trial court found that the contract was between CNL and the participating locals. (Finding of Fact No. 34, A. 29). Therefore the policy was issued to the locals, which local unions paid the premiums. (App. 64). Sec. 842 (c) does not proscribe or contain any participation requirement or limitation. Thus, applicable Illinois law does not contain the "75% requirement" which appears in MMG 1128. CNL argues Sec. 842 (c) is not applicable for the reason that it does not contain or express a "75% requirement." (Petition, 14). Respondents submit such argument is circular. The Petitioner must show that the alleged provision of the Illinois statutes containing the relied upon "75% requirement" is applicable to MMG 1128, not start from the "75% requirement" contained in MMG 1128 and dismiss all statutory provisions which do not happen to include a "75% requirement" as inapplicable.

Therefore, Ill. Rev. Stat. ch. 73 Sec. 842 (2) (e) is not applicable to MMG 1128 by its terms based upon the facts surrounding the issuance, policyholder and administration of MMG 1128.

**B. There is no evidence that the language of Ill. Rev. Stat. ch. 73 Sec. 842 [2] [e] was expressly incorporated into MMG 1128.**

Although CNL indicates that since the trial level it has strongly maintained MMG 1128 was governed by, Ill. Rev. Stat. ch. 73 Sec. 842 (2) (e), (Petition, 12), the present argument was never expressly raised until *after* the trial and judgment was entered. CNL never requested a Finding of Fact or Conclusion of Law specifically regarding the application of Sec. 842 (2) (e) or incorporation of any language thereof to or in MMG 1128. (Defendant's requested Finding of Fact and Conclusions of Law, App. 87-101; Supplemental Findings of Fact and Conclusions of Law, App. 102-107).

Although the evidence indicates ample and logical opportunities or occasions existed, both during negotiations and at the trial, for CNL to forward its position regarding the application and incorporation of the language of MMG 1128, it appears such was never attempted. For example, during the negotiations, the "75% requirement" was specifically discussed and modified in a meeting between representatives of CNL and the locals. (R. 381, 383, 222-223). The fact that not all the member unions desired to participate was also specifically discussed with CNL's representatives. (R. 219-220, 213-214). Petitioners presented no witness to testify that the alleged connection with Sec. 842 (2) (e) was ever specifically discussed or even mentioned by CNL's representatives during any negotiations with the locals. Likewise, during the trial, although CNL had two expert actuarial witnesses and its President, who is also an attorney, (R. 916) testify on its behalf, never once was

any attempt made to prove the alleged application or incorporation of the language of Sec. 842 (2) (e).

Further, Petitioner's legal counsel was involved in the events preceeding the cancellation of MMG 1128 (R. 704), yet the sole reason contained in the letters notifying the locals of CNL's action was that the presidential wage price freeze prevented CNL from increasing the premiums. (Finding of Fact No. 22, A. 27). It appears the true reason for cancellation was that the claims were exceeding the premiums. (R. 703-704, 775). Had it been CNL's intention to cancel MMG 1128 due to a suspected violation of the "75% requirement", it is reasonable to assume CNL would have inquired of its records in order to determine the actual participation or enrollment at that point in time. This was not done. (R. 791). In fact, as of three days after the letters of cancellation were sent to the locals, CNL had no official position regarding the validity or invalidity of MMG 1128. (R. 911-912).

Most invitingly, the trial court when finding the language of the Application and MMG 1128 regarding the "75% requirement" to be ambiguous, allowed extrinsic evidence in order to determine the intentions of the parties regarding such. (Finding of Fact No. 21, A. 27). CNL presented no evidence regarding Sec. 842 (2) (e).

No evidence was ever presented by CNL to substantiate that the "75% requirement" in MMG 1128 was related in any manner to Sec. 842 (2) (e). The record does seem to show CNL, despite ample opportunities to affirm or prove its present position that Sec. 842 (2) (e) is the true source of the "75% requirement" which appears in MMG 1128, was unable to do so.

**C. Even if the petitioner could show the "75% requirement" in MMG 1128 was expressly incorporated from Ill. Rev. Stat. ch. 73 Sec. 842 [2] [e], only 75% of the individual members of each local union affiliated with the WCOE which chose to participate were required to be enrolled.**

CNL has not shown either from the language of Sec. 842 (2) (e) itself or from legislative intent that the "75% requirement" is intended to be more inclusive than a single policyholder and thus encompass the situation, as in the instance, wherein multiple policyholders exist under one master group policy.

In light of the limited scope of Sec. 842 (2) (e), the trial court could nonetheless still find, as it did, the language of the application and MMG 1128 relating to the "75% requirement" to be ambiguous and allow the parties to present evidence of their construction thereof. (Finding of Fact No. 21, A. 27). It was determined that this language was intended by the parties to require membership by 75% of the eligible individuals of each participating local union which was a member of the WCOE and the parties so construed it. (Finding of Fact No. 21, A. 27). The Tenth Circuit Court of Appeals stated that this Finding is supported by substantial evidence and not clearly erroneous and would not be disturbed by them. *International Union of Operating Engineers 953 v. Central National Life Insurance Company,* 501 F.2d 902, 907 (10th Cir. 1974). Error is not presumed but must be affirmatively shown, *Aetna Insurance Co. v. Rhodes* 170 F.2d 111 (10th Cir. 1948). CNL has not affirmatively shown such error. A trial courts findings shall not be set aside unless clearly erroneous. *U. S. v. U. S. Gypsum Co.* 333 U. S. 364, *rehearing denied,* 333 U. S. 869 (1948).

Thus, even if CNL could show the "75% requirement" of Sec. 842 (2) (e) is that appearing in MMG 1128, the lower courts could correctly decide that only 75% of the individual members of each participating local were required to be enrolled.

**D. Even if the Petitioner's arguments had intrinsic merit, Petitioner would be subject to the defenses of waiver and estoppel.**

Under Illinois law, insurance provisions proscribed by statute may be waived, and the insurer, by its conduct, can be estopped

from asserting them. *Midwest Triangle Paint Works v. Fireman's Ins. Co.* 36 Ill. App. 2d 65, 183 N. E. 2d 562 (1962). Respondents contend the law set out in *Midwest* is applicable to the situation herein. Petitioners argue that *Midwest* requires a determination of the scope of the waiver. Respondents submit that *Midwest* is not so restrictive, but rather, indicates the large dimensions of the general rule. Just as a constitutional right may be waived so may an insurer wave a provision prescribed under a statute which is to its benefit. *Midwest* at 564-565. As an example of the dimension of the rule, even a provision stating no provision may be waived unless in writing attached to the policy may itself be waived by the insurer. *Midwest* at 564.

The locals paid the premiums due. (Finding of Fact No. 20, A. 27). CNL accepted these premiums and paid death claims pursuant to MMG 1128. (Df. Ex. 32, R. 713, not included in App.)

Assuming Sec. 842 (2) (e) to apply and nonwithstanding the apparent extent of the rule, it would appear that there is ample evidence in the record in view of the above authority to support the trial court's Conclusion of Law No. 24, (A. 34), regarding waiver and estoppel, which in itself inherently and logically carries with it a determination of scope.

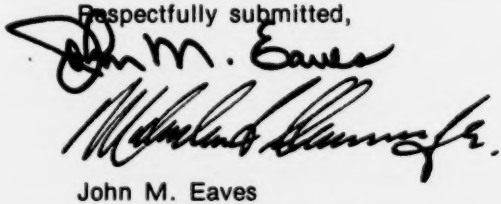
## IV
## CONCLUSION

The Court of Appeals, in affirming the judgment of the trial court, properly interpreted the application of Illinois statutory law and Illinois case precedents regarding the "75% requirement" appearing in MMG 1128 and the parties construction thereof. Further, the record amply supports the factual findings of the trial court comprising the context in which this case arose, about which the Court of Appeals exhibited no apparent misunderstanding.

Petitioner has not shown the issues presented in this case rise to the dignity of national concern, but rather, affect only the immediate parties.

Based upon the decision of the lower courts and the arguments and authorities presented herein, Respondents respectfully request the Petition for Centiorari be denied.

Respectfully submitted,



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